Filed 7/23/19 P. v. Guerrero CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAVID PAUL GUERRERO et al., Defendants and Appellants.	B284001 (Los Angeles County Super. Ct. No. TA126680)

APPEAL from judgments of the Superior Court of Los Angeles County. Eleanor Hunter, Judge. Affirmed in part; remanded in part for resentencing as to Defendant and Appellant David Paul Guerrero. Affirmed as to Defendant and Appellant Ricardo Banuelos Veyna.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant David Paul Guerrero.

Paul Couenhoven, under appointment by the Court of Appeal, for Defendant and Appellant Ricardo Banuelos Veyna.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Defendants and appellants David Paul Guerrero and Ricardo Banuelos Veyna were tried for murders that stemmed from a long-running gang rivalry in the city of Compton. The jury found Guerrero and Veyna guilty of the first degree, special circumstance murder of Corey Ferguson, and also found Guerrero guilty of the first degree, special circumstance murder of Questshawn Irving. Firearm and gang allegations were found true as to both defendants.

We affirm the judgments of conviction. As to defendant Guerrero, we remand for resentencing, in light of the passage of Senate Bill No. 620 during the pendency of this appeal, to allow the trial court the opportunity to exercise its newly granted discretion with respect to the firearm enhancements pursuant to Penal Code section 12022.53.

FACTUAL AND PROCEDURAL BACKGROUND

1. Overview of the Gang History, the Murders and Key Individuals

Defendants Guerrero and Veyna are members of the Compton Varrio Setentas, otherwise known as CV-70, a primarily Hispanic street gang in east Compton with approximately 100 active members. CV-70 is made up of various cliques, including Chicos, the clique to which both Guerrero and Veyna belonged. Guerrero's gang moniker is "Evil" and Veyna is known as "Frisk."

CV-70 is not allied with any other gang. Graffiti and tattoos related to the gang often include the letters "EBK" meaning "everybody killer." Their main rivals are the eastside Piru gangs, which are predominantly African-American street gangs associated with the Bloods. Among the Piru gangs in the east Compton area are Lime Hood, Leuders Park and Natural

Born Players or NBP. NBP is a small clique made up mostly of members of the extended Ferguson family, including one of the murder victims in this case, Corey Ferguson, and his relatives Dewan and Brandon B.[1]

Since the early 2000's, the Chicos clique of CV-70 has been feuding with the eastside Piru gangs, primarily NBP. In 2001, Rikki J. was shot and killed. Rikki was the sister of Antonio J., another longtime member of the Chicos clique known as "Tone." NBP was blamed for her death.

On October 23, 2004, Questshawn Irving, a Lime Hood Piru gang member and one of the murder victims in this case, was shot and killed near the intersection of Atlantic and San Luis Street, an area claimed by both CV-70 and the Piru gangs.

On August 18, 2012, Corey Ferguson, the other murder victim in this case, was shot and killed in the front yard of his family home in Compton.

Two additional murders are relevant to the proceedings but were not part of the charges against either defendant. Darryl White, who was related to the Ferguson family, was shot and killed in 2002. Melvin Walker, an NBP gang member, was shot and killed several years later.

2. The Charges and Relevant Procedure

In 2005, charges were filed against defendant Guerrero for the murders of Questshawn Irving and Darryl White. In 2006, the prosecution dismissed the Irving murder count because of the inability to locate Greg D., a key witness. The prosecution

---

[1] We refer to the victims and witnesses only by their first names or their initials to protect their privacy. (Cal. Rules of Court, rule 8.90.)

proceeded with the case against Guerrero and two other CV-70 gang members for the Darryl White murder. Guerrero was convicted, based in part on the testimony of three members of the rival NBP clique who are members of the extended Ferguson family, Corey Ferguson, Dewan and Brandon. In 2011, the conviction was reversed.

In 2013, a felony complaint was filed against defendant Veyna for the murders of Corey Ferguson and Roshaun Gant. In a 2014 trial, a jury found Veyna guilty of the Gant murder. The jury deadlocked on the Ferguson murder count and a mistrial was declared. The parties agreed to defer sentencing of Veyna on the Gant murder conviction until after retrial of the Corey Ferguson murder.

In 2014, Guerrero was also charged with the murder of Corey Ferguson, and charges were refiled against him for the murder of Questshawn Irving.

In December 2015, the charges against both defendants were consolidated. Both defendants were charged with the first degree murder of Corey Ferguson, a special circumstance murder based on the allegation that defendants killed Ferguson because he was a witness to a crime (Guerrero's murder of Darryl White), and that defendants committed the murder while active participants in a criminal street gang. Guerrero was also charged with the first degree murder of Questshawn Irving, a special circumstance murder based on the allegation that Guerrero committed the crime while an active participant in a criminal street gang. A multiple-murder special circumstance and gang and firearm use enhancements were alleged against both defendants.

The case proceeded to a jury trial in March 2017. In addition to the facts set forth above, the testimony and evidence at the 2017 trial established the following material facts.

3. The Questshawn Irving Murder

On October 23, 2004, Juan F. was at work at an automotive shop near the intersection of Atlantic and San Luis Street in the city of Compton. Sometime shortly before 5:00 p.m., Juan saw a dark blue sedan stopped at the intersection. The driver was pointing a gun so Juan ducked down just as the sedan started to make a right turn from San Luis onto Atlantic. Juan then heard about five or six gunshots, in rapid succession. After a few moments, Juan got up and saw a man lying on the sidewalk, bleeding. There was a bike lying nearby.

Meanwhile, Phyllis H., a former airport police agency employee, was driving southbound on Atlantic approaching the intersection with San Luis Street. She heard what sounded like a car backfiring. In her sideview mirror, Phyllis saw the driver of a car, heading in the opposite direction. His arm was extended out the window, shooting. Phyllis heard five or six shots in a row. The gun looked like a semiautomatic, but she could not tell for sure from her vantage point.

Phyllis believed the car the shooter was driving was a dark-colored late model Lexus sedan. We reserve a more detailed discussion of Phyllis's testimony regarding the color of the shooter's car to part 5.a. of the Discussion, *post*.

Phyllis was shocked by the brazenness of the shooter with so many people on the street, and she made a U-turn to try to follow the car, determined to get a license plate number. She was several cars behind the shooter and noticed a patrol car headed in the opposite direction. She could not catch the deputies'

attention so she briefly followed the shooter's car, but after it made a turn she lost sight of it. She turned around and returned to the intersection where a crowd had gathered around a man lying in the street, near a bicycle. Phyllis stayed on the scene and gave a statement to a deputy.

About 4:30 p.m., Deputy Joseph Sumner was outside a home on Atlantic just south of San Vicente, where he and his partner, Deputy Choi, had responded to an unrelated call. Deputy Sumner heard several gunshots that sounded close by, within 100 to 150 yards. He and Deputy Choi looked down the street in the direction of the gunshots and saw "several cars in the street and people scattering." They got into their patrol car and headed toward the scene. Deputy Sumner saw people pointing in the direction of a car turning from Atlantic onto San Vicente. It was a dark-colored, probably black, Lexus. Deputy Sumner turned on San Vicente and pursued the Lexus, but eventually lost sight of it. He and Deputy Choi continued to drive down San Vicente for several more blocks, searching for the car to no avail. They then returned to the scene after they received a radio call of a gunshot victim at that location.

4. The Investigation of the Irving Murder

Homicide Detective William Marsh arrived on the scene and spoke with Deputies Sumner and Choi. In walking the scene, two medium caliber "copper-jacketed" bullets were collected. No cartridge casings were found. Two additional medium caliber bullets were recovered during the autopsy of Questshawn Irving. The coroner identified the cause of Irving's death to be multiple gunshot wounds. Irving had suffered six gunshot wounds in the attack, with one shot in the upper right back likely being the fatal shot.

In addition to collecting the bullets and some blood evidence, Detective Marsh had Irving's bicycle tested for fingerprints. A fingerprint matching Dewan was found on the handle bar. Detective Marsh eventually located Dewan almost two years later at Wasco State Prison.

By January 2006, the Irving murder remained unsolved. Detective Peter Hecht, who had been working a general gang detail in Compton, was assigned to a special task force that had been formed by the Los Angeles County Sheriff's Department specifically "to target the CV-70 gang" and to "stop the explosion of shootings, murders, that were occurring in the east Rancho Dominguez area of Compton at that time." Detective Hecht's primary duty was to monitor the activities of CV-70, as well as the rival Piru gangs in the area that "were at war with the CV-70's."

In May 2006, while investigating the shooting death of Melvin Walker, Detective Hecht went to speak with some of Walker's family members who lived in Lime Hood Piru territory. One of them told him that Greg, who lived across the street, might have information about the 2004 murder of Questshawn Irving. Detective Hecht crossed the street and spoke with Greg who was outside on his porch. Greg told him that on October 23, 2004, he was outside in his front yard getting ready to have a barbeque. He saw Questshawn Irving and Dewan leave to go to the store. Irving was riding a bike, and Dewan was walking alongside of him. A few minutes after they left, he saw a dark-colored Lexus driving fast down San Vicente and nearly hit Melvin Walker as he was coming across the street to Greg's house. Greg said the driver was Guerrero, whom he knew as Evil. Shortly thereafter, a black and white patrol car drove by.

A couple of months later, Detective Hecht returned to Greg's house to show him a six-pack photographic lineup (six-pack), with Guerrero's photograph in the number 5 spot. Greg was cooperative and agreed to view the six-pack. He looked at it and pointed at Guerrero's picture and said "that's Evil." He told Detective Hecht that he had known Guerrero for years, as they had lived a couple of blocks from one another when they were younger. Greg circled the photograph, wrote his initials next to the picture, and then wrote, "Evil was being chased by the police the day [Questshawn Irving] was killed."

Detectives Hecht and Marsh lost track of Greg for the next several years. They were able to locate him for a preliminary hearing on the Irving murder in 2015. However, by that time, Greg recanted his prior statement about what he saw on the day Irving was killed. When Detective Marsh drove Greg back home after the hearing, he asked why he recanted and Greg said, "You don't gotta live here."

At the 2017 trial, Greg was again uncooperative and, in response to most questions, claimed an inability to remember. Greg acknowledged being a close friend of Melvin Walker, and that he was friendly with a number of the older members of the Ferguson family. He also acknowledged that on the afternoon of October 23, 2004, he and Walker were outside. Thereafter, when asked about his prior statement to Detective Hecht, Greg said he did not feel well, did not want to be a snitch, and could not remember what had occurred. When offered his prior statement and the six-pack he had initialed to refresh his recollection, Greg refused to look at them.

An audio recording of an interview Greg gave in 2015 before the preliminary hearing was played. He acknowledged it

was his voice on the recording and that he said he had grown up with a lot of CV-70 gang members, but that "some of them had this little vendetta thing, that they don't want to let up."

5. The Corey Ferguson Murder

On the evening of August 18, 2012, Peggy B. went to visit family in Compton, arriving at the Ferguson family home around 5:00 p.m. The family gathering included Peggy, Shaana S., A.F., and several others. Peggy's nephew Corey Ferguson was in the front yard talking on his phone. Peggy and a few others started up a game of dominoes in the garage. The garage door was open to the driveway and front yard.

At some point, Peggy heard several loud noises that she initially thought were firecrackers. There was a pause, then three more quick shots and the sound of someone running. Peggy remembered that Corey was out front. She looked out toward the front yard for him and saw someone on the ground. A Hispanic man wearing a white T-shirt and black baseball cap holding a gun walked up, pointed his gun down at the person on the ground and shot "a couple more times." The shooter then ran out of the yard. Peggy then realized it was Corey laying on the ground.

When the gunshots rang out, A.F. grabbed her five-month-old baby and headed for the door to the house. As she ran, she heard three or four more gunshots. A.F. looked in the direction of the shots and saw a man who appeared to be Hispanic pointing a handgun towards the ground and shooting. The shooter was wearing a baseball cap and had a "long nose." She only looked briefly because she was worried about getting her baby, as well as three other children, out of harm's way. A.F. was aware that CV-70 gang members had been targeting her family for some time.

That summer evening Danna G. was driving through the neighborhood with her sister Stephanie. Danna needed to make a phone call so she pulled over to park, and just happened to stop near the Ferguson home. She did not know the family. She noticed a Hispanic male walking into the front yard of a home who "looked like he was up to something." She mentioned the Hispanic man to Stephanie and then almost immediately heard three to six gunshots. Stephanie also heard about three gunshots.

The shooter then walked past Danna's car and looked right at her. Danna noticed that "his nose was kind of long." She told Stephanie she would "never forget that face." She did not notice any tattoos on the shooter's arms but she was primarily focused on his face. Danna then heard people screaming and saw someone laying on the ground.

6. The Investigation of the Ferguson Murder

Detective Domenick Recchia arrived at the Ferguson home sometime after 8:00 p.m. No shell casings were recovered near the body, leading Detective Recchia to suspect a revolver was used in the shooting. Detective Recchia saw gunshot wounds to Ferguson's torso and head. It was later determined, by autopsy, that Ferguson died from multiple gunshot wounds, including two fatal, close-range shots to the head, two shots to the torso, and a "graze" wound to the left wrist. Four bullets or bullet fragments were recovered and forwarded to the crime lab for testing.

Peggy spoke with Detective Recchia when he arrived on the scene and gave him a description of the shooter. She said he appeared to be about five feet nine inches tall and had a medium build. She did not recall any tattoos on his arms but had been

focusing on his face. Peggy was interviewed again a short time later by Detective Recchia and shown a six-pack. Peggy identified Veyna as the shooter.

Stephanie also spoke to Detective Recchia and described the shooter as a male Hispanic, wearing a white shirt, black pants, white tennis shoes and a black baseball cap. She later was shown a six-pack and identified Veyna as the shooter. She recognized his "long nose."

Sergeant Vergilian Bolder responded to the scene and canvassed the neighborhood for possible witnesses. He spoke with Claudia B. who lived in an apartment near the intersection. She said she was inside her apartment when she heard a gunshot. When she looked out her window, she saw someone on a bicycle, heard several more gunshots and then the bicyclist fell to the ground.

By August 2012, Deputy Sumner, who had pursued the shooter's Lexus after the Questshawn Irving murder, had been promoted to detective. Since 2007, he had been working as a gang investigator and was assigned to the special task force created in 2006 to monitor CV-70 activity. As part of his duties, Detective Sumner regularly documented gang-related graffiti in the neighborhood. In the summer of 2012, he began to notice some new graffiti in the areas claimed by the Chicos clique of CV-70. Many of the new tags reasserted the area as CV-70 territory, crossed out the claims of rival Piru gangs and included the moniker Frisk, Veyna's moniker. Detective Sumner believed an escalation in the years-long feud between CV-70 and Piru might be gaining momentum. He passed along the information to Detective Jonas Shipe, one of the detectives investigating the Ferguson murder.

In November 2012, Antonio (Tone) was driving around in Chicos territory with defendant Veyna. They stopped periodically so Veyna could paint graffiti. At one location, a patrol car pulled up. Antonio and Veyna fled, leading the deputies on a high-speed chase. They eventually eluded the deputies and abandoned the vehicle. From the abandoned vehicle, the deputies were able to identify the registered owner and arrested Antonio a couple of days later. While in custody, Antonio asked to speak with Detective Sumner.

Detective Sumner knew Antonio from his years working the gang detail, and knew he was an active member of CV-70. Antonio told Detective Sumner he had information about the Ferguson murder. Detective Sumner arranged for Detectives Recchia and Shipe to speak with Antonio. Antonio told the detectives that Veyna had been bragging about the Ferguson murder and that he had used a .357 revolver. Antonio agreed to become an informant for the Sheriff's Department.

Detective Recchia sought to corroborate the information from Antonio. He prepared a six-pack with Veyna's photograph, relying on the Department's computer program to randomly select the five similar photographs. Detective Recchia showed the six-pack to Peggy and she identified Veyna as the shooter. Antonio's statement that a .357 handgun had been used was consistent with the bullets recovered during the Ferguson autopsy.

In January 2013, a surveillance operation was arranged in which Antonio agreed to wear a wire. Detective Sumner and several other deputies participated in the operation. The plan was for Antonio to attempt to purchase a gun from Veyna, and potentially recover the weapon used in the Ferguson murder.

Antonio exchanged a series of texts with Veyna in which he said he knew someone interested in buying a .357 handgun. Veyna said he had a Ruger .357 and he was willing to accept $400 for it. When Veyna mentioned the German brand Ruger, Antonio responded with a text saying "my German friend." Veyna then responded, "its dem slob niggas friend too." The word "slob" was a slang term for a Blood or Piru gang member. Veyna also said he could not accept less than $400 for the gun because he needed to buy another gun since he could not risk being without one.

On the night of January 16, 2013, Veyna arrived at Antonio's house as planned. Veyna told Antonio (who was wearing a wire) he did not want to sell the .357 after all, but that he had a 0.22-caliber handgun he would sell. Veyna retrieved the two guns from a side compartment in his car and showed them to Antonio. When Veyna showed him the .357, he said "I'm not done with this." Antonio told Veyna the person who wanted to buy a gun was not interested in buying a .22. Veyna put both guns back in the compartment in his car and left a short time later.

Antonio called Detective Sumner and told him Veyna had a .357 revolver and another gun concealed in a compartment in his car and had just left his house. Deputies involved in the surveillance operation pulled over Veyna's car and searched it. A Ruger .357 magnum revolver (loaded) and a .22 caliber semiautomatic handgun were found "[i]nside the wheel well, just above the locking mechanism, where the rear passenger door locks."

Subsequent ballistics testing demonstrated that the bullets recovered from Corey Ferguson's body "were of the type loaded into a .38 special or .357 magnum caliber" cartridge, and most likely manufactured by Ruger, Smith & Wesson or Taurus.

However, they were not fired from the .357 recovered from Veyna's car. The test results did match the gun to another crime. (The jury was not told this information, but the other crime was the Gant murder for which Veyna was convicted in the 2014 trial.)

After the surveillance operation, Detectives Recchia and Sumner sought to relocate Antonio immediately for his safety. Antonio expressed a desire to continue assisting them. Antonio gave Detective Sumner information on another case that he followed up on and determined to be credible. Antonio was then provided relocation assistance for a move outside of Los Angeles County.

In April 2014, Detective Recchia learned of a jailhouse phone call made by defendant Guerrero to Nina M. on August 4, 2012, a couple of weeks before the Ferguson murder. Nina was a longtime associate of the gang known as "Tootie" and good friends with Guerrero. Defendant Veyna had just been released from prison and Guerrero was still in custody, awaiting retrial in the Darryl White case. Sometime between 2010 and mid-2011, Guerrero and Veyna were both housed at Corcoran State Prison in general population.

As is customary, the jailhouse phone call had been recorded. At the beginning of the call, Nina told Guerrero she was getting ready to go to a party at Veyna's house. Guerrero told Nina to "tell that fool I said what's up" and remind him "he's still got that list I gave him. . . . [¶] . . . [¶] . . . [H]e can clarify a couple of the, the question marks." "Tell him the question marks on the list, they're good." He then repeated, "Tell him the question marks on them list, he'll, he'll know what I'm talking about." Later, Guerrero said when "we were over there in

Corcoran. [¶] . . . . . [¶] . . . I talked to him." He also told Nina to call "Tone" when she got to the party. At the end of the call, Guerrero said "Don't forget all that shit I told you." Nina responded, "I know, okay, Tone, tell Frisk what's up, the list."

7. The In-court Identifications

Both Peggy and A.F. identified Veyna in court as the person who shot Corey Ferguson. Peggy expressed nervousness and fear about testifying in court because of what had happened to her family members "coming to court" and testifying like Corey had.

In identifying Veyna in court, A.F. also acknowledged her initials on a six-pack that had been shown to her pretrial in which she circled Veyna's picture in the number 4 spot and wrote that the shooter "looks very similar to the person in no. 4." A.F. explained that she "knew" Veyna was the shooter but she was afraid to be asked to testify, so she only said he looked similar, hoping that would be enough to help the deputies investigate but would not require her to testify. At the preliminary hearing, she was still living at the Ferguson family home in Compton and was scared to testify, so she did not positively identify Veyna as the shooter. When shown a photograph of the family members who had been shot, she said she did not want to suffer the same fate. Sometime after the preliminary hearing, A.F. was provided relocation assistance from the district attorney's office. A.F. said she was still a bit scared but was willing to tell the truth and testify. On cross-examination, A.F. said she could not recall whether she noticed at the time if the shooter had tattoos.

Danna and her sister Stephanie both identified Veyna as the shooter and acknowledged their prior six-pack identifications of Veyna. Danna said she did not identify Veyna in a prior court

proceeding because she was scared, explaining that Veyna had calmly walked up and shot someone multiple times so she figured he could do the same to her. Danna ultimately agreed to testify truthfully at trial because she was told her name would be kept out of any reports. Stephanie also identified Veyna as the shooter, saying she had not seen him walk into the yard, but did see him walking out of the yard after the gunshots and right past her and her sister. Stephanie said that she too had been reluctant to testify because she knew how "gang-related people" are—they are willing to kill witnesses. On cross-examination, Stephanie said she did not see any tattoos on the shooter, but she was not focused on looking for tattoos at the time.

8. Brandon's Testimony

Brandon was part of the extended Ferguson family and a member of NBP. Like Corey and Dewan, he had testified at Guerrero's trial for the murder of Darryl White, who was Brandon's cousin. In 2002, Darryl was shot and killed in a driveby shooting by CV-70 gang members. Guerrero was a passenger in the car involved in the shooting. Brandon did not initially come forward and identify Guerrero because of his fear of CV-70 and being labeled a snitch. "[I]t was clear that they was out to kill us [the Ferguson family]." However, he eventually testified against Guerrero at trial, and at the later retrial. Not long after Darryl was killed, Brandon was shot at by CV-70 gang members while he was driving his car. They did not hit him, but the shooting caused him to crash his car. He said Antonio, whom he knew as "White Boy" was involved in that incident. Brandon admitted he was a member of NBP but he denied it was a gang, saying it was just a group of friends who hung out and partied.

He also admitted to prior convictions for domestic violence and forgery.

9. Antonio's Testimony

Antonio explained he had been a member of the Chicos clique of CV-70 for over a decade. He was known as "Tone," but some rival African-American gang members referred to him as "White Boy" because he was light-skinned.

Antonio had known Guerrero for years and considered him like a brother. Guerrero was known as Evil and was widely respected and feared within CV-70. Antonio also believed Guerrero was feared by rival gang members. Guerrero had several gang tattoos including on his head, neck and arms, one of which was the letters "EBK" which stood for "everybody killer." Veyna, known as Frisk, also had numerous tattoos, including on his arms. One of his tattoos was the word "Compton" spelled with the letter P embellished with bullet holes, which stood for "Piru Killer."

In 2001, Antonio's sister Rikki was shot in the head and killed. The CV-70's believed Piru gang members were responsible. Because Rikki had been well-liked, her murder made a lot of people angry. Guerrero had been with Rikki when she was murdered and he urged retaliation, saying we "[g]otta get all of these niggers." The Chicos clique targeted the Piru gangs (Leuders Park, Lime Hood and NBP) for retaliation. Antonio knew most of the NBP members were members of the same family (the Fergusons) and were often at the Ferguson home, where multiple family members lived. He knew them mostly by their gang monikers.

Antonio said that in August 2012, just after Veyna had been released from prison, he went to Veyna's house for a small

party celebrating his release. Antonio went with another CV-70 gang member named Osito. Nina was one of the guests. At some point during the party, Veyna approached Antonio and Osito and started talking about how the Fergusons "gotta go." Antonio understood Veyna to be referring to the members of the Ferguson family that had testified against Guerrero in the Darryl White murder trial. While they were talking, Veyna showed Antonio a kite he had received from Guerrero. The kite contained a list of names, three of which were Ferguson family members (identified by their monikers): Corey, Dewan and Brandon. Veyna said that "the homies are down on the case" and "these bitch-ass niggers gotta go." When Veyna saw the list he knew it meant there would be "a whole bunch of killing." Antonio explained that he understood Veyna to be saying the Ferguson family members who had testified in the Darryl White case against Guerrero had to be eliminated.

Veyna told Antonio that he knew Corey Ferguson could often be found at the family home in Compton, but asked Antonio for help in locating Dewan and Brandon. Antonio said he would help Veyna but no specific arrangements were made at that time.

Antonio heard that several days later, Corey Ferguson was shot and killed. Not long after, Veyna came over to Antonio's house and told him that he had approached Ferguson at his home, pretending he was there to buy marijuana. Veyna said he then shot him in the back and in the head with a .357 revolver. Veyna was "grinning" when he said it "like he was proud of what he did."

After Antonio was arrested in November 2012 for felony evasion, his wife was angry and moved out and took their son with her. He explained that he had started using drugs after his

sister was murdered and ever since, he had been in and out of trouble with gang life for some 15 years. He wanted to "finish [that] chapter" of his life. He decided to become a "snitch" by helping the police even though he knew his life would be at risk. He said he wanted something better for his son and reached out to Detective Sumner because he had told him on prior occasions that he would help him if he ever wanted to get out of the gang life.

Antonio said his agreement to cooperate included pleading to the 2012 felony evasion charge for which he served time in jail and was placed on three years probation. He also received relocation assistance. Antonio admitted to various prior convictions dating back to 1999, including a 2004 conviction for assault with a deadly weapon and convictions for possession of a controlled substance, possession of a firearm, escape, and owning a chop shop.

10. The Gang Evidence

Detective Sumner testified as the prosecution's gang expert. He discussed gang culture generally and explained that snitching, whether cooperating with law enforcement or testifying in court, is not tolerated. Gangs expect to exact justice in the streets, not in the criminal justice system. Hit lists are not unusual in gang culture. Ordinarily, hit lists targeting individuals for retaliation originate with a senior gang member or shot caller.

Detective Sumner explained that gangs continue to operate inside of jails and prisons and that gang members regularly communicate by using "kites" which are a type of jailhouse letter. They are small handwritten notes, tightly rolled or folded up, and often put in plastic from a glove and concealed until they can be

delivered. Detective Sumner identified a kite found in Guerrero's possession in which he signed it Evil with the number 70. The kite Veyna showed Antonio at the party was never located.

Detective Sumner attested to the primary activities of CV-70, which included assaults with firearms and murder, among other crimes. He authenticated various certified abstracts of judgment and identified the predicate offenses involving CV-70 gang members, including the conviction of Joe Toledo for the murder of Melvin Walker (an NBP member), the conviction of Marcos Contreras (a relative of Guerrero) for the 2003 murder of an NBP member at the Ferguson home, and the conviction of Israel Mendoza for multiple attempted murders in 2010.

Based on prior contacts with them and their numerous tattoos, Detective Sumner stated his opinion that both Veyna and Guerrero were active CV-70 gang members. Neither defendant contested their gang membership at trial.

Based on hypothetical questions framed using the facts of the Irving and Ferguson murders, Detective Sumner stated that in his opinion both such murders would benefit the gang, bolstering its reputation and eliminating witnesses testifying against members of the gang.

11. Additional Evidence

In 2014, Deputy Sam Dang was a bailiff providing courtroom security. During a court appearance in 2014, Veyna was allowed to change out of his prison clothes, and his handcuffs were taken off. Once in the courtroom, Veyna passed by Deputy Dang and muttered, "This is bullshit." Veyna then started to walk toward the swinging double doors as if he were going to leave the courtroom. Deputy Dang grabbed Veyna's arm and another deputy assisted in restraining him.

Sometime in 2015 while Guerrero was in custody, Deputy Jeff Rabideaux was assigned to search Guerrero when he arrived for a court appearance. In one of the pockets of Guerrero's pants, Deputy Rabideaux found what appeared to be a handmade handcuff key, as well as a small folded up paper note that looked like a prison kite.

12. The Defense Evidence

Defendants did not testify.

Guerrero called three witnesses, Claudia B., Miguel G. and Moises I., all of whom offered testimony related to the Irving murder.

In 2004, Claudia (who had also given a statement to Sergeant Bolder shortly after the shooting) said that on the afternoon of October 23, 2004, she was outside her second-floor apartment when she saw someone riding a bicycle "very fast," with a car following him. There were two people in the car. No one was sitting on the handlebars of the bicycle. Claudia heard gunshots and saw the man on the bicycle fall to the ground. The car then drove away quickly.

Miguel G. was working as a security guard at a business located near the intersection. He was outside when the shooting occurred and "saw the whole thing." He saw a guy on a bicycle. When he got to the corner he got off his bike and started to cross the street. A black Crown Victoria with three people inside drove by and the guy "flipped them off." The rear passenger shot several times, hitting the guy with the bike in the back and the head.

On cross-examination, Miguel said he told everything to Detective Marsh when he was interviewed after the shooting. He acknowledged his voice on a recording of that interview. In the

audio recording, Miguel said he heard the gunshots, not that he saw the shooting. He also conceded that in the recording he reported seeing a white van, not a Crown Victoria. He said he did mention a Crown Victoria to a defense investigator who interviewed him in 2016.

Moises I. testified he was at his auto shop that day and heard gunshots but did not see anyone shooting. When he looked in the direction of the sound of the gunshots, he saw a beige or gray-colored sports car making a "hard" turn at the intersection. But it all happened very fast and he did not see much. He denied saying the car was dark in color. He recalled the driver being in the car alone.

13. The Rebuttal Evidence

Detective Marsh was recalled and explained that he interviewed Miguel on the night of the shooting and he never mentioned a Crown Victoria. Miguel only told him that he saw a white van turning a corner at the intersection after he heard the gunshots, and later saw the victim lying on the sidewalk with several "unknown males" around him. He said he had not witnessed the actual shooting.

Detective Marsh also interviewed Moises after the shooting. Moises did not provide any information about a beige or gray car. Moises said he saw a dark-colored Lexus or Nissan with tinted windows and "after market" wheels with a "five-point design." He had been very specific about describing the wheels to Detective Marsh.

The prosecutor also called the defense investigator, Derek Kawai, whose name had been turned over in response to the court's discovery order. We reserve a more detailed discussion of

the facts related to the discovery order to part 2 of the Discussion, *post*.

14. The Verdict and Sentencing

The jury found both defendants guilty of the first degree murder of Corey Ferguson (count 3). As to Guerrero, the jury also found true all three special circumstance allegations (Pen. Code, § 190.2, subd. (a)(3), (a)(10) & (a)(22)), as well as the firearm use and street gang allegations (§ 12022.53, subd. (d) & (e)(1), § 186.22)[2]. The jury also found Guerrero guilty of the first degree murder of Questshawn Irving (count 5), and found true the special circumstance, firearm and gang allegations.

As to Veyna, the jury found true both special-circumstance allegations and the firearm use and street gang allegations. With respect to the multiple-murder special-circumstance allegation, Veyna waived his right to a jury trial. The court took judicial notice of Veyna's conviction by jury of the Gant murder in the 2014 trial and found the multiple-murder special-circumstance allegation true.

The court sentenced Guerrero as follows: for the Ferguson murder, life without the possibility of parole, plus a consecutive term of 25 years to life for the firearm enhancement; and for the Irving murder, life without the possibility of parole, plus a consecutive term of 25 years to life for the firearm enhancement. The court stayed the gang enhancements.[3]

---

[2] During trial, the prosecution dismissed the firearm use allegations pursuant to Penal Code section 12022.53, subdivisions (b) and (c), and proceeded only on the allegations at subdivisions (d) and (e)(1).

[3] In our review of the record, we found erroneous language in a sentencing minute order pertaining to Guerrero from

The court sentenced Veyna as follows: for the Ferguson murder, life without the possibility of parole, plus a consecutive term of 25 years to life for the firearm enhancement. The court took judicial notice of the 2014 conviction for the murder of Gant and imposed a term of life without the possibility of parole, plus a consecutive term of 25 years to life for the firearm enhancement. The court dismissed the gun possession counts on which Veyna was found guilty in 2014. The court stayed the gang enhancements.

These appeals followed.

DISCUSSION

Defendant Guerrero

1. The Motion to Dismiss the Irving Murder Count or Alternatively to Sever Both Murder Counts

Guerrero first contends the trial court prejudicially erred in denying his motion to dismiss the Irving murder count, as well as his alternative request for a severance of that count from the Ferguson murder count.

We review a trial court's ruling on a motion to dismiss for abuse of discretion "and defer to any underlying factual findings if substantial evidence supports them." (*People v. Cowan* (2010) 50 Cal.4th 401, 431 [discussing review of motion to dismiss for

---

September 19, 2017, stating as to both murder counts: "defendant is ordered to serve an additional term of life without the possibility of parole pursuant to P.C. 190.2(a)(2)." The court did not, and cannot, impose an additional term pursuant to the special circumstance allegation. Based on the special circumstance allegations, the court imposed a life without the possibility of parole sentence on each murder count. The trial court is ordered to correct this minute order nunc pro tunc.

"prejudicial prearrest delay"]; see also *People v. Smith* (2016) 245 Cal.App.4th 869, 873 [ruling on motion to dismiss pursuant to Pen. Code, § 1385].) The same is true for a trial court's ruling on a motion to sever pursuant to Penal Code section 954, which vests the court with discretion to order severance on a showing of good cause in the interests of justice. (*People v. Kraft* (2000) 23 Cal.4th 978, 1030 (*Kraft*); *People v. Bean* (1988) 46 Cal.3d 919, 935.) We find no abuse of discretion in either ruling by the trial court here.

Guerrero argues that dismissal of the Irving murder charge was warranted because it was a 12-year-old crime based on weak evidence. He contends the passage of time impacted his ability to present a defense and allowed the prosecution to bolster a weak case by joining it with the second murder charge.

To establish a basis for dismissal due to delay in prosecution, a defendant "must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. [Citations.] A claim based upon the federal Constitution also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant." (*People v. Catlin* (2001) 26 Cal.4th 81, 107.) Even where, as here, trial proceeds several years after the commission of the crime, prejudice will not be presumed. It must be affirmatively shown. (*People v. Nelson* (2008) 43 Cal.4th 1242, 1250 (*Nelson*); *People v. Abel* (2012) 53 Cal.4th 891, 908-909 (*Abel*).) This is particularly important in a murder case which has no statute of limitation. (*Nelson,* at p. 1250.) "[I]f the defendant fails to meet his or her burden of

showing prejudice, there is no need to determine whether the delay was justified." (*Abel,* at p. 909.)

Guerrero has not shown there was any deliberate intent to delay trial of the Irving murder in order to gain a tactical advantage or otherwise prejudice his defense. The Irving murder occurred in 2004. Guerrero was initially charged with that murder in 2005, along with the murder of Darryl White. However, the prosecution dismissed the Irving murder count because it could not locate Greg, a key witness. The prosecution proceeded with the charge against Guerrero for the murder of Darryl White. The broader investigation continued, and after locating Greg, charges were refiled in June 2015 against Guerrero for the Irving murder, along with new charges on the Ferguson murder that had occurred in 2012.

The potential for witness recall problems equally impacted both the prosecution and the defense. Guerrero has not shown any prejudice uniquely impacting the defense. Guerrero's assertion the prosecution was able to "bolster" a weak case by joining it with a second murder charge is without merit, as neither case was more inflammatory than the other. Both involved bold murders in broad daylight in front of multiple witnesses.

Guerrero argues the trial court abused its discretion in failing to grant his alternative request for severance, contending there was no cross-admissibility of evidence because the crimes were unrelated and occurred more than eight years apart. Guerrero asserts it would have been difficult, if not impossible, for the jurors to segregate the evidence related to each murder and not use the evidence of the two murders as propensity evidence.

Counts 3 and 5 were both murder charges. Penal Code section 954 sets forth a *statutory preference for joinder of offenses involving the same class of crimes*. Because joinder generally promotes efficiency, it " ' " 'is the course of action preferred by the law.' " ' " (*People v. O'Malley* (2016) 62 Cal.4th 944, 967.) As our Supreme Court has explained, when two or more charged offenses are "of the same class, the statutory requirements for joinder [are] satisfied." (*Kraft*, *supra*, 23 Cal.4th at p. 1030.)

Accordingly, Guerrero can predicate his claim of error "only on a clear showing of potential prejudice." (*Kraft*, *supra*, 23 Cal.4th at p. 1030; accord, *People v. Carter* (2005) 36 Cal.4th 1114, 1153.) " ' " 'The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' " ' " (*Kraft,* at p. 1030.)

Here, there was cross-admissibility because of the evidence demonstrating a complicated, and long-running gang rivalry that explained both murders. "Offenses 'committed at different times and places against different victims are nevertheless "connected together in their commission" when they are, as here, linked by a " 'common element of substantial importance.' " [Citations.]' " (*People v. Mendoza* (2000) 24 Cal.4th 130, 160 (*Mendoza*).)

Guerrero has not demonstrated that the court's consolidation order resulted in clear prejudice to his defense. Nor has he shown that consolidation resulted in "gross unfairness." (*Mendoza*, *supra*, 24 Cal.4th at p. 162 ["Even if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process.' "].)

2. The Discovery Order

Guerrero next argues the court violated Penal Code section 1054.3 and his right to due process by ordering him to turn over a defense investigative report and contact information for his investigator.

In his opening statement, Guerrero's counsel identified the factors he believed undermined the credibility of Dewan, who the prosecutor had referred to in opening statement as a key witness to the Irving murder. Counsel told the jury that he and his investigator had just spoken to Dewan, in jail, a couple of weeks earlier and "he recanted the whole thing," referring to his prior identification of Guerrero as the shooter in the Irving murder. "He made it all up" hoping to "get something out of it." Counsel continued, saying he did not know what Dewan was "going to say now" but he believed the evidence would show that both murder charges against Guerrero were based largely on "dubious informant[s]," meaning Dewan and Antonio.

Guerrero's counsel then began discussing the expected testimony, and credibility issues, with Antonio. After an objection by Veyna's counsel, a sidebar conference was held. While the court was discussing the issue pertaining to Veyna, the prosecutor interjected, saying the prosecution had never been given any statement or report about any recent interview of Dewan by defense counsel in which Dewan purportedly recanted. The court told Guerrero to turn over the statement. Guerrero objected, saying it was rebuttal or impeachment that did not have to be turned over, and that the prosecution had already been informed of the recantation.

The trial court overruled defense counsel's objection, explaining he had used the conversation in opening statement

and it therefore must be produced. The court ordered defense counsel to provide a copy of his investigator's report of the oral conversation with Dewan as well as the investigator's contact information.

"Prosecutorial discovery is a pure creature of statute, in the absence of which, there can be no discovery. [Citations.] 'In criminal proceedings, under the reciprocal discovery provisions of [Penal Code] section 1054 et seq., all court-ordered discovery is governed exclusively by—and *is barred except as provided by—the* discovery chapter . . . .' " (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1167 (*Hubbard*).)

Penal Code section 1054.3 sets forth a criminal defendant's discovery obligations. "The statutory language of Penal Code section 1054.3, subdivision (a) is straightforward: The defense is required to disclose the 'names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial.' The language of this section contains nothing that would authorize the discovery of statements from witnesses whom the accused does not intend to call at trial." (*Hubbard*, *supra*, 66 Cal.App.4th at p. 1169; see also *Izazaga v. Superior Court* (1991) 54 Cal.3d 356.) Moreover, there is nothing in the discovery statute that requires a criminal defendant to "disclose evidence gathered by an investigator who may tentatively be called by the defense for impeachment purposes." (*Hubbard,* at p. 1170.)

Guerrero contends he never stated an intention to call, nor intended to call his investigator to testify. He expected merely to cross-examine Dewan when called by the prosecution. But that was by no means clear to the court during trial. Defense counsel told the jury that Dewan recanted in a conversation with the

investigator. The trial court reasonably inferred Guerrero intended to call his investigator to attest to the interview if Dewan denied it.

The discovery order was harmless by any standard. Guerrero claims the prosecution was able to elicit testimony from the investigator, Mr. Kawai, that undermined the defense witnesses. However, Mr. Kawai's testimony was brief, relatively insignificant and cumulative of testimony from Detective Marsh.

The prosecution called Mr. Kawai in its rebuttal case, to rebut the testimony of Miguel and Moises. (Since Dewan did not testify, the prosecutor did not ask Mr. Kawai about his interview of Dewan.) The prosecution questioned Mr. Kawai only briefly about his interview of Miguel in October 2016 and his interview of Moises in April 2015.

Miguel had testified for the defense that he saw a rear passenger in a black Crown Victoria shoot Questshawn Irving. On cross-examination, Miguel admitted he told Detective Marsh on the night of the shooting that he saw a white van turning a corner at the intersection after he heard gunshots, not that he had seen the shooting. Mr. Kawai testified that when he interviewed Miguel in October 2016, Miguel never mentioned seeing a Crown Victoria or a white van.

Moises had testified for the defense that after he heard shots, he saw a beige or gray car make a hard turn at the intersection where Questshawn Irving was shot. Mr. Kawai testified that when he interviewed Moises in April 2015, Moises said he did not witness the shooting at all.

Before Mr. Kawai was called to the stand, Detective Marsh had already testified as a rebuttal witness, describing in detail and at some length the inconsistencies in the testimony offered

by Miguel and Moises. Mr. Kawai corroborated some of Detective Marsh's testimony but did not tell the jury anything they had not already heard from Detective Marsh and in the taped interview of Miguel. The prosecution would have been able to elicit that testimony from Detective Marsh in rebuttal irrespective of any discovery order. Guerrero's contention it was Mr. Kawai's testimony that undermined the defense witnesses is without merit. Guerrero has not shown the outcome of the case would have been different if the discovery had not been disclosed. (*People v. Gaines* (2009) 46 Cal.4th 172, 182-183.)

3. The Motion for Mistrial

Guerrero contends the trial court abused its discretion in denying his motion for mistrial. We are not persuaded.

" ' " 'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and *the trial court is vested with considerable discretion in ruling on mistrial motions*. . . .' [Citation.] A motion for a mistrial should be granted when ' " 'a [defendant's] chances of receiving a fair trial have been irreparably damaged.' " ' " [Citation.]' " (*People v. Harris* (2013) 57 Cal.4th 804, 848, italics added; *People v. Navarette* (2010) 181 Cal.App.4th 828, 834 [reviewing court reviews for abuse a trial court's reliance on a curative instruction in denying request for mistrial].)

This is the basis of Guerrero's claim of prejudice: In opening statement, the prosecutor said Dewan would identify Guerrero as the shooter in the Irving murder. In response, Guerrero was "forced" to disclose in his opening statement that Dewan made statements implicating Guerrero in other murders

(statements that had allegedly been discredited) in order to explain to the jury that one of the prosecution's main witnesses lacked credibility. The next day, the prosecutor withdrew Dewan as a witness and did not call him to the stand. Guerrero argued a mistrial was warranted because the jury was tainted by hearing from his own lawyer about the other murder accusations that would never have been disclosed except as the expected basis for impeaching the credibility of Dewan. The trial court denied the motion, reasoning the jury was instructed that opening statements were not evidence.

Guerrero does not make any argument that the prosecutor acted in bad faith in identifying Dewan as an expected witness in opening statement. He asserts only that the District Attorney's office was aware that Dewan was unreliable as a witness. Nothing in the record suggests the prosecutor did not intend to call Dewan when opening statements were made, or that the decision not to call Dewan was nefarious or anything other than a routine decision of the type ordinarily made during the course of a trial. In fact, the prosecutor made similar decisions as to other listed trial witnesses, including Shaana S.

Though the prosecutor decided not to call Dewan, she arranged for Dewan to be brought to court and made available to the defense to call as a witness. Guerrero declined to call him as a witness.

The court properly instructed the jury that nothing said by counsel in opening statements is evidence. Guerrero has not shown his defense was irreparably damaged by anything said during opening statement. The trial court acted well within its discretion in denying the motion for mistrial.

4. The Request for Separate Juries

Guerrero contends the court committed error in denying his request for separate juries and in allowing Antonio to testify about Veyna's statements related to the alleged hit list and the gun buy operation. He argues that those statements by co-defendant Veyna were inadmissible hearsay and violated his constitutional rights under the confrontation clause and to a fair trial. We find the statements were not hearsay and did not violate Veyna's constitutional right of confrontation.

We also agree with respondent the contention was forfeited. In his pretrial written opposition to the prosecution's motion to consolidate, Guerrero did raise hearsay objections and made only a passing reference to the *Aranda*/*Bruton* rule.[4] However, no objections were raised at trial to any specific testimony on the grounds that it violated *Aranda*/*Bruton* or otherwise violated Guerrero's rights under the confrontation clause. The contention is therefore forfeited. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1044 ["[a]bsent a timely and specific objection" based on the *Aranda*/*Bruton* rule, the appellate contention is deemed waived].)

In any event, the contention, to the extent it can be properly assessed without a precise identification of the specific, objectionable testimony, appears to be without merit. In *People v. Arceo* (2011) 195 Cal.App.4th 556, 571, we explained the applicable law as follows: "First, the confrontation clause has no application to out-of-court nontestimonial statements [citations], including statements by codefendants. [Citations.] [¶] Second, even if the *Bruton* rule applied to nontestimonial statements of

---

[4] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.

nontestifying codefendants, *Bruton* itself involved hearsay statements of codefendants that were "clearly inadmissible" under the rules of evidence. . . . [U]nder *Bruton* and its progeny, a codefendant's hearsay statement *is* admissible 'if it falls within a "firmly rooted" hearsay exception or is "supported by a showing of particularized guarantees of trustworthiness." [Citation.]' "

Antonio's testimony about his conversation with Veyna at the party in August 2012, as well as his later conversation, wearing a wire, with Veyna during the gun buy operation, was nontestimonial. Both were conversations between friends in a noncoercive setting. (See, e.g., *People v. Rangel* (2016) 62 Cal.4th 1192, 1214-1215 [in determining whether a statement is testimonial " 'the question is whether, in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony" ' "] & *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1402 [statements made "unwittingly" to informant are not testimonial for confrontation clause purposes].)

Moreover, the statements were not hearsay. They were admissible under the coconspirator exception to the hearsay rule. (Evid. Code, § 1223.) There was considerable evidence independent of Antonio's testimony demonstrating a conspiracy between Guerrero and Veyna, including that they had been housed together at Corcoran State Prison, Guerrero repeatedly mentioned in a jailhouse call with Nina a list of "question marks" he had given Veyna, and Veyna showed Antonio the kite Guerrero had given him. The kite listed the names of the three witnesses who had testified against Guerrero in the Darryl White murder trial, including Corey Ferguson. Our Supreme Court has explained that under both state and federal constitutional law,

the *Aranda*/*Bruton* "rule does not apply to statements made by coconspirators during and in furtherance of the conspiracy." (*People v. Roberts* (1992) 2 Cal.4th 271, 304.)

The statements were also admissible as statements against penal interest. (Evid. Code, § 1230.) Veyna showed Antonio the kite and asked Antonio for help in finding the men on the hit list, implicating himself in the murder conspiracy. In text messages, Veyna joked with Antonio about using his firearms against rival African-American gangsters like Corey Ferguson, which also subjected him to the risk of criminal liability.

5. The Claimed Evidentiary Errors

Guerrero contends the court committed several prejudicial evidentiary errors, and that such errors resulted in a deprivation of due process and a violation of his right to a fair trial.

It is well settled that a trial court's ruling on evidentiary issues is ordinarily reviewed under the deferential abuse of discretion standard. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 372 (*Lewis*) [trial court's ruling under Evid. Code, § 352 excluding proffered third party culpability evidence reviewed for abuse].) Moreover, our Supreme Court has rejected efforts to inflate "garden-variety evidentiary questions into constitutional ones." (*People v. Boyette* (2002) 29 Cal.4th 381, 427.) A due process violation occurs only where evidentiary error results in the complete preclusion of a defense. (*Id.* at pp. 427-428; accord, *People v. Bacon* (2010) 50 Cal.4th 1082, 1104, fn. 4 & *People v. Thornton* (2007) 41 Cal.4th 391, 452-453.) We find no evidentiary errors, nor any constitutional violations.

a. Phyllis's testimony

Guerrero argues the court erred in denying his request to strike Phyllis's testimony pertaining to the color of the car she

saw at the scene of the Irving murder. When initially asked on direct whether she could describe the car the shooter was driving, Phyllis said it was so long ago she could not remember. However, she then said it might have been a Lexus and she thought it was white. The prosecutor asked her if she recalled giving a statement to a deputy at the scene and if reviewing her statement would help refresh her memory. She said yes. The prosecutor showed Phyllis the statement and after looking at it, she responded "Okay. Then if I indicated it was a dark-colored vehicle, then it was a dark-colored vehicle."

When asked if she was saying it was a dark-colored car because her memory had been refreshed, or only because she read it in the written statement, Phyllis replied, "I'm saying because I read it from the report. This was 2004. I don't remember . . . the color of the vehicle and all that." Guerrero objected to the testimony and moved to strike it from the record. The trial court overruled his objection. In further questioning, Phyllis said she was interviewed by a deputy soon after the incident, that she told the truth to the best of her ability, and that the deputy was collecting the information as she said it.

The prosecutor initially offered to show Phyllis the statement to refresh her recollection, but with additional questioning, she laid the proper foundation for admission of Phyllis's testimony under the past recollection recorded exception to the hearsay rule. (Evid. Code, § 1237; see also *People v. Dennis* (1998) 17 Cal.4th 468, 530-531.)

b. Evidence of other murders

Guerrero's second claim of evidentiary error concerns the admission of evidence pertaining to the murder of other Ferguson family members at the family home in Compton.

Both Peggy and A.F. attested to their fear of coming to court and identifying Veyna. Both defendants objected to the prosecution's use of a photograph depicting several Ferguson family members who had been shot and killed at the home, including a seven-year-old child. After several sidebar discussions over the use of the photograph, the court allowed it to be admitted when the prosecution rested. The image of the child was redacted from the version admitted into evidence.

The credibility of the eyewitness testimony, including Peggy and A.F., was central to the prosecution's case with respect to the Corey Ferguson murder. Therefore, testimony intended to explain the basis for any witness who demonstrated reluctance to testify or equivocation in identifying the shooter, either in court or in prior statements, was relevant. " ' "[E]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to [his] [or her] credibility and is well within the discretion of the trial court. [Citations.]" ' " (*People v. Adams* (2014) 60 Cal.4th 541, 570.)

While it amounted to a relatively brief portion of their respective testimony, both Peggy and A.F. acknowledged that the shooting deaths of their family members, including those who had testified, was a significant factor in their fear of coming forward and positively identifying Veyna as the shooter. A.F. said it had been the reason she equivocated in positively identifying Veyna in the six-pack. "I didn't want to be one of the ones getting killed at that house because of this case."

The evidence was relevant and probative of witness credibility and was not elicited solely to evoke sympathy for those

witnesses. Its admission was well within the court's discretion. Guerrero has not shown that any prejudice from the relatively brief discussions by Peggy and A.F. of the deaths of other family members outweighed the probative value of such evidence.

c. Evidence of third party culpability

Guerrero also contends the trial court improperly excluded third party culpability evidence. Guerrero sought to offer photographic evidence of another CV-70 gang member known as "Little Sharkey," who apparently looked somewhat similar to Guerrero, and who had been a victim of a shooting while driving a dark-colored Lexus. Guerrero conceded there was no evidence that Little Sharkey was driving that Lexus anywhere in the vicinity of the Irving murder on October 23, 2004. The trial court ruled the evidence insufficient to warrant admission as third party culpability evidence but told defense counsel the issue could be revisited if additional evidence came to light. No additional evidence was presented. We have no quarrel with the court's ruling excluding the evidence. " '[W]e do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [T]here must be *direct or circumstantial evidence linking the third person to the actual perpetration of the crime*.' " (*People v. Geier* (2007) 41 Cal.4th 555, 581, italics added.)

6. The Court's Response to the Jury Question and Instruction on Transferred Intent

Guerrero next argues the court prejudicially erred in responding to the jury's question relating to the Irving murder and in subsequently instructing on transferred intent. We are not persuaded.

The jury submitted a question referring to page 46 of the jury instructions (CALCRIM No. 521), asking: "Does first degree murder still apply if the intended target was not the victim?" The court told counsel it made an error in failing to instruct on transferred intent and that it intended to read CALCRIM No. 562 to the jury as follows: "If the defendant intended to kill one person but, by mistake or accident, killed someone else instead, then the crime, if any, is the same, as if the intended person had been killed." Guerrero objected on the grounds there was no evidence to support the instruction. The trial court overruled the objection, citing to the statement by Greg that Dewan had been with Questshawn Irving just before the murder, and Dewan's fingerprint was found on Irving's bike. Thus, the jury could reasonably conclude Dewan, and not Irving, was the intended murder victim.

After receiving the court's response and deliberating further, the jury then asked whether the language regarding transferred intent applied to all special allegations. The court answered, in writing, "yes."

"The Supreme Court has held that Penal Code section 1138 imposes on the trial court a mandatory 'duty to clear up any instructional confusion expressed by the jury.' [Citation.] 'When a jury asks a question after retiring for deliberation, "[Penal Code] [s]ection 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law. [Citation.]" . . . Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." [Citation.] We review for an

abuse of discretion any error under section 1138.' " (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1016.)

The evidence that Irving had been seen in the company of Dewan just prior to the shooting, Dewan's fingerprint on the handle bar of Irving's bike, and the substantial evidence of the long-running feud between the Chicos clique and the Ferguson family was more than sufficient to warrant the court instructing on transferred intent as the jury could reasonably believe Dewan and not Irving was the intended target.

7. The Claimed Prosecutorial Errors

Guerrero recites a litany of acts and statements by the two prosecutors throughout the trial, contending they amounted to prosecutorial misconduct.

A majority of the challenged acts were not objected to in the trial court on any ground, or on the ground now urged, and therefore any appellate challenge has been forfeited. "It is well settled that making a *timely and specific* objection at trial, and requesting the jury be admonished . . . is a necessary prerequisite to preserve a claim of prosecutorial misconduct for appeal." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328, italics added; accord, *People v. Davenport* (1995) 11 Cal.4th 1171, 1209.)

We discuss only those acts or statements to which a specific objection was timely made, or for which there is a proper basis for concluding an objection would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*).)

Guerrero challenges the prosecutors' use of his gang moniker, Evil, throughout the course of the trial. Guerrero's counsel objected early in the trial, outside the presence of the jury, to Guerrero being referred to by his moniker. The court

overruled the objection. We will treat the objection as having preserved the issue for appeal.

We reject the contention. The prosecutors referred to Guerrero throughout the trial alternately by his moniker, as Mr. Guerrero or as defendant. The prosecutors similarly referred to numerous other witnesses and individuals by their respective gang monikers. (We have not quoted here the many examples of this in an attempt to not overtax the already exhausted reader.) We find nothing inappropriate in the use of the moniker which was based on the evidence received through numerous witnesses.

Guerrero contends the prosecutor improperly referred to facts outside the record by arguing that he, Veyna and their fellow gang members "talk[ed] in code." Counsel for Veyna objected and the trial court overruled it. The prosecutor then said, "They talk in vague generalities, so that you have to pay attention, and you have to put the pieces of the puzzle together." Shortly thereafter, the prosecutor again made a reference to the testimony about the hit list possibly being in code. Veyna's counsel again objected saying there was no testimony about a code. The court overruled the objection.

The prosecutor did not refer to facts outside the record. The argument merely suggested reasonable inferences to be drawn from the evidence.

Guerrero objected to the prosecutor stating in closing argument that the jury should hold the defendants responsible for their bad choices and "send the message that we're not going to be part of their army and we're not going to tolerate this." The objection was overruled. However, the court thereafter allowed defense counsel to submit a proposed instruction to the jury.

At the end of the closing arguments, the court reiterated to the jury that nothing the attorneys said constituted evidence. The court then said, "[J]ust to highlight: You cannot let any kind of bias or prejudice or sympathy or public opinion influence your verdict here. It is not your job to send a message or to do anything like that. [¶] Your job is to look at the evidence, follow the law, then come to a conclusion, if you can." To the extent there was anything improper in the prosecutor's choice of words, it was unquestionably ameliorated by the court's instructions.

During the examination of Detective Sumner, the prosecutor asked if he attempted to verify the information provided by Antonio. Detective Sumner said that he did "just to see if he was going to tell me the truth, and he did." Defense counsel objected on the grounds of improper vouching. At sidebar, the court sustained the objection to the extent Detective Sumner asserted that Antonio told him the truth. The court asked the prosecutor to rephrase the question. In responding to a follow-up question, Detective Sumner said that the information provided by Antonio was corroborated by other evidence. Guerrero has not shown any improper conduct by the prosecutor in this exchange.

8. Cumulative Error

Guerrero argues the combined evidentiary errors and prosecutorial misconduct deprived him of due process and a fair trial. "In examining a claim of cumulative error, the critical question is whether defendant received due process and a fair trial. [Citation.] *A predicate to a claim of cumulative error is a finding of error*. There can be no cumulative error if the challenged rulings were not erroneous." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068, italics added.) As we have

explained, there were no evidentiary errors or prosecutorial misconduct.

9. Evidence Supporting the Irving Murder

Guerrero challenges the evidence supporting his conviction for the Irving murder. We review the record according to the familiar standard. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 (*Rodriguez*) [appellate court reviews the "whole record in the light most favorable to the judgment to determine whether it discloses . . . evidence that is reasonable, credible, and of solid value"].)

We conclude there is ample evidence in the record supporting Guerrero's conviction. There was overwhelming evidence of motive based on the long-running feud between the Chicos clique (of which Guerrero was a member), and rival Piru gang members, including the Ferguson family and the NBP clique. There was evidence of Guerrero's personal antipathy for the Ferguson family based on the belief they were responsible for Rikki's death in 2001. There was evidence that Dewan was in close proximity to Irving at the time of the shooting, or shortly before the gunshots rang out. Dewan's fingerprint was found on the handle bar of the bike Irving was riding at the time he was shot. Eyewitnesses described the shooter driving a dark-colored sedan. Deputy Sumner testified to hearing the shots ring out and attempting to pursue a dark-colored sedan down San Vicente until he lost sight of the car. And, there was Greg's prior statement to Detective Hecht that he saw Guerrero that afternoon in a dark-colored sedan driving fast down San Vicente with a black and white patrol car in apparent pursuit.

That evidence, and all reasonable inferences arising therefrom, were more than adequate for the jury to rest its

finding of guilt. (*Rodriguez*, *supra*, 20 Cal.4th at p. 11 [substantial evidence review is "the same in cases in which the prosecution relies mainly on circumstantial evidence"]; see also *Kraft*, *supra*, 23 Cal.4th at p. 1053 ["appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence"].)

10. The Firearm Enhancements

Finally, Guerrero contends that in the event this court is inclined to affirm his conviction, he is nonetheless entitled to a remand for resentencing in light of the passage of Senate Bill No. 620 (2017–2018 Reg. Sess.) during the pendency of this appeal.

On January 1, 2018, Senate Bill No. 620 took effect, amending Penal Code section 12022.53, subdivision (h). The amendment grants discretion to trial courts to strike or dismiss an enhancement imposed under section 12022.53. (Stats. 2017, ch. 682, § 2.) The statute in effect at the time of defendant's sentencing mandated imposition of the enhancement.

The discretion to strike a firearm enhancement under Penal Code section 12022.53 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742-748; see also *People v. Brown* (2012) 54 Cal.4th 314, 323.) It is undisputed Guerrero's appeal was not final on January 1, 2018, and he is therefore entitled, as respondent concedes, to the benefit of the amendatory provision.

However, respondent also points out that the trial court imposed a term of life without parole as to both special circumstance murders, rejecting Guerrero's request to strike the special circumstance allegations and impose a life term with the

possibility of parole. Indeed, in describing the Ferguson murder, the court said the intentional killing of a witness is "one of the most serious crimes."

We may decline to remand where the trial court has expressed a clear intent to impose the maximum sentence and remand would be an "idle act." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 427.) However, unless the court's intention is unequivocal in the record, we should ordinarily allow the trial court to exercise its sentencing discretion in the first instance. (*Ibid*.)

While it may seem unlikely the trial court would strike the firearm enhancement given the special circumstance findings and the imposition of an indeterminate term, we cannot say the record reflects unequivocally how the court would proceed. Accordingly, we remand to allow the trial court the opportunity to exercise its discretion under subdivision (h) of Penal Code section 12022.53. We express no opinion as to how the trial court should exercise its discretion on remand.

The resentencing hearing is ordered only as to defendant Guerrero. Defendant Veyna did not raise the argument on his own, nor join in Guerrero's argument.

Defendant Veyna

1. Appointment of Counsel for Retrial

Veyna's first challenge concerns the denial of his motion for appointment of a specific attorney of his choosing as counsel to be provided by the state. In the 2014 trial, Veyna was represented by privately retained counsel. Within a few weeks of the conclusion of that trial, Veyna made a motion pursuant to *Harris v. Superior Court of Alameda County* (1977) 19 Cal.3d 786

(*Harris*) asking the court to appoint his retained counsel as his counsel for the retrial. Veyna claimed he could not afford to pay counsel for the retrial, that he had developed a relationship of trust with counsel during the course of the first trial, and that there were efficiencies in allowing his counsel to continue instead of appointing a new attorney who would have to become familiar with the case. The trial court denied the motion.

We review a trial court's order concerning the appointment of counsel for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1184.) We find no such abuse here.

When Veyna requested appointed counsel for the retrial on the Ferguson murder, both the public defender's office and the alternate public defender's office declared a conflict. The trial court appointed an attorney from the county's approved panel of qualified attorneys. In so doing, the trial court followed the order of preference for indigent appointments set forth in Penal Code section 987.2, subdivisions (d) and (e).

The trial court's "discretion in the appointment of counsel is not to be limited or constrained by a defendant's bare statement of personal preference." (*Harris, supra,* 19 Cal.3d at p. 799.) The right to select counsel of one's choice applies "only to retained counsel." (*People v. Mungia* (2008) 44 Cal.4th 1101, 1122.) An indigent defendant does not have " ' "the right to *select* a court-appointed attorney," but a trial court may abuse its discretion in refusing to appoint an attorney "with whom the defendant has a long-standing relationship." [Citation.]' [Citation.] In deciding whether a particular attorney should be appointed to represent an indigent defendant, a trial court considers subjective factors such as a defendant's preference for, and trust and confidence in, that attorney, as well as objective factors such as the attorney's

special familiarity with the case and any efficiencies of time and expense the attorney's appointment would create." (*People v. Alexander* (2010) 49 Cal.4th 846, 871.)

Citing *People v. Chavez* (1980) 26 Cal.3d 334 (*Chavez*), Veyna claims the trial court abused its discretion by adhering to an inflexible rule to only appoint from the county's approved panel of attorneys without considering the relevant subjective factors favoring his request. *Chavez* held "[t]he exercise of the court's discretion in the appointment of counsel should not [be] restricted by an inflexible rule, but rather should [rest] upon consideration of the particular facts and interests involved in the case before it." (*Id*. at p. 346.) Because the trial court there refused to give the defendant "an opportunity to explain why he preferred that his former counsel represent him at trial, the court effectively foreclosed consideration of any arguments which [the] defendant may have marshalled in support of" the appointment of his former counsel. (*Ibid*.) *Chavez* concluded it was the trial court's refusal to allow the defendant the opportunity to present "what circumstances, if any" warranted the appointment of his former counsel that amounted to an abuse of discretion. (*Id*. at pp. 347-348.)

The trial court here did not refuse to consider defendant's arguments. The trial court noted it was rare for an appointment outside the approved panel to occur, but there is nothing in the record to suggest the court did not consider defendant's written motion setting forth his arguments favoring his former counsel, or that the court neglected to take those subjective factors into consideration in making its ruling. Veyna has not shown an abuse of the court's discretion.

2. Competency to Stand Trial

Veyna next contends the court violated his constitutional right to due process and a fair trial by refusing to appoint an expert to reassess his competency during the 2014 trial based on his erratic behavior. We disagree.

A defendant is presumed competent to stand trial. (*People v. Campbell* (1976) 63 Cal.App.3d 599, 608; see also Pen. Code, § 1369, subd. (f) ["It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent."].) "A defendant is deemed incompetent to stand trial if he lacks ' " 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [or] a rational as well as factual understanding of the proceedings against him [or her].' " ' " (*People v. Lightsey* (2012) 54 Cal.4th 668, 690; accord, *People v. Mickel* (2016) 2 Cal.5th 181, 194-195 (*Mickel*); see also Pen. Code, § 1367, subd. (a) ["A defendant is mentally incompetent . . . if . . . the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."].)

Prior to the start of the 2014 trial, Veyna's counsel declared a doubt as to his competency pursuant to Penal Code section 1368. The court suspended the proceedings and appointed two forensic psychologists. Dr. Lydia Bangston subsequently reported that Veyna was incompetent to stand trial. Dr. Kory Knapke disagreed, finding Veyna was competent.

The court therefore appointed a third doctor. Dr. Sanjay Sahgal interviewed Veyna on February 5, 2014. He reported that Veyna was competent to stand trial, and was feigning impairment. Among other things, Dr. Sahgal reported there

were no authentic signs of impairment and no identifiable psychiatric disorders. Dr. Sahgal pointed out an example of Veyna's attempt to feign hearing impairment. During the interview, Veyna claimed repeatedly he could not hear the doctor speaking to him through the cell door and refused to answer various questions. However, when a deputy, located down the hall in a location not visible to Veyna, ordered him to step back from the door, he complied without hesitation. Dr. Sahgal concluded Veyna was able to rationally engage with counsel and participate in the proceedings if he chose to do so.

At the competency hearing on February 20, 2014, the trial court considered all three doctors' reports, as well as court records from four prior felony convictions suffered by Veyna in which no doubt as to his competency had been raised. The court found Veyna competent to stand trial and resumed the criminal proceedings.

During the trial, Veyna's counsel again raised the issue of competence, claiming that Veyna was hearing voices and saying that spirits or ghosts were "playing" with his mind. Counsel asked the court to appoint a doctor to reassess him. The court acknowledged that Veyna was mumbling to himself but found nothing to indicate he did not understand what was going on. The court found that, consistent with Dr. Sahgal's prior assessment, Veyna appeared to be attempting to manipulate the proceedings by choosing to be uncooperative and malingering. The court found no evidence to declare a doubt as to Veyna's competence and suspend the trial.

"A trial court's decision whether or not to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial."

(*People v. Rogers* (2006) 39 Cal.4th 826, 847; accord, *People v. Danielson* (1992) 3 Cal.4th 691, 727, overruled in part on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 [" 'An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper.' "].)

Nevertheless, if a trial court "is presented with 'substantial evidence of present mental incompetence,' . . . the defendant is 'entitled to a section 1368 hearing as a matter of right.' [Citation.] On review, our inquiry is focused not on the subjective opinion of the trial judge, but rather on whether there was substantial evidence raising a reasonable doubt concerning the defendant's competence to stand trial." (*Mickel*, *supra*, 2 Cal.5th at p. 195.)

"To raise a doubt under the substantial evidence test, we require more than 'mere bizarre actions' or statements, or even expert testimony that a defendant is psychopathic, homicidal, or a danger to him- or herself and others. [Citations.] Rather, the focus of the competence inquiry is on a defendant's understanding of the criminal proceedings against him or her and the ability to consult with counsel or otherwise assist in his or her defense. [Citation.] [A] [d]efendant's trial demeanor is relevant to, but not dispositive of, the question whether the trial court should have suspended proceedings under [Penal Code] section 1368. [Citation.] In assessing whether the trial court erred in failing to suspend proceedings, we consider all evidence related to [the] defendant's competence of which the trial court had become aware before it entered judgment." (*Mickel*, *supra*, 2 Cal.5th at p. 202.)

There is no substantial evidence in the record raising a doubt about Veyna's competence during the 2014 trial. He had been assessed by three doctors, two of whom had declared him competent. Dr. Sahgal articulated solid grounds supporting his opinion Veyna was not suffering from any mental disorder but was feigning impairment and being manipulative. Veyna's claim of hearing voices, with no prior history of mental health problems or other obvious behavior reflecting a lack of understanding of the proceedings around him, was insufficient to raise a reasonable doubt and suspend the trial. The trial court acted well within its discretion in refusing to suspend proceedings and appoint a fourth doctor to assess Veyna.

3. The Claimed Evidentiary Errors

Finally, Veyna argues the trial court committed prejudicial evidentiary error. We review a trial court's evidentiary rulings for abuse of discretion. (*Lewis*, *supra*, 26 Cal.4th at p. 372.)

We already concluded in part 5.b. of the Discussion, *ante*, that the admission of the photograph and testimony regarding the other murders at the Ferguson family home was not error.

Veyna also challenges the trial court's admission of his text message to Antonio in which he referred to his .357 revolver as "dem slob niggas friend too." Veyna's counsel objected on the grounds of undue prejudice and due process. Counsel specifically noted he was not concerned that the admission of the text message would make Veyna look like a racist, only that it implied criminal propensity and a past or future criminal purpose for the gun.

The text message to Antonio in which Veyna revealed an obvious animus toward rival African-American gang members was relevant to establishing the motive, and circumstantially

Veyna's intent, for committing the Ferguson murder. We therefore are not persuaded its probative value was outweighed by any prejudice.

Veyna's reliance on *People v. Cardenas* (1982) 31 Cal.3d 897 is unavailing. There, the prosecution was allowed to introduce evidence suggesting the defendant's three alibi witnesses were gang members, purportedly to show bias. (*Id*. at pp. 902-903.) *Cardenas* concluded such evidence was minimally relevant at best, and unduly prejudicial, since the potential bias of the witnesses had already been established by evidence they were close friends of the defendant. Under such circumstances, the gang references only served to create a "real danger" the jury would improperly infer the defendant had a criminal disposition and was more likely than not to have committed the charged offenses. (*Id*. at pp. 904-905.)

We are not persuaded there was any such danger here. The admission of the text message was harmless by any standard. The evidence establishing Veyna as the shooter of Corey Ferguson was substantial. Veyna was identified by multiple witnesses as having engaged in a particularly brazen, daytime, close-range shooting in front of numerous people. Antonio testified that Veyna bragged about the murder and apparently showed a preference for using .357 caliber guns. There was also the extensive evidence of the gang rivalry and the conspiracy with Guerrero to eliminate witnesses. Given that evidence, no reasonable jury would conclude the one text message bragging about his use of the gun was more inflammatory or of greater weight. Nor do we believe the evidence could have reasonably tipped the scale against Veyna.

DISPOSITION

The judgment of conviction as to defendant and appellant Ricardo Banuelos Veyna is affirmed.

As to defendant and appellant David Paul Guerrero, we remand for resentencing to allow the trial court the opportunity to exercise its discretion pursuant to Penal Code section 12022.53, subdivision (h). After resentencing, the superior court is directed to prepare and transmit an abstract of judgment to the Department of Corrections and Rehabilitation. The judgment of conviction as to defendant and appellant Guerrero is affirmed in all other respects.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.